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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF THE APPLICATION OF THE ARIZONA ELECTRIC DIVISION OF CITIZENS COMMUNICATIONS COMPANY TO CHANGE THE CURRENT PURCHASED POWER AND FUEL ADJUSTMENT CLAUSE RATE, TO ESTABLISH A NEW PURCHASED POWER AND FUEL ADJUSTMENT CLAUSE BANK, AND TO REQUEST APPROVED GUIDELINES FOR THE RECOVERY OF COSTS INCURRED IN CONNECTION WITH ENERGY RISK MANAGEMENT INITIATIVES.

DOCKET NO. E-01032C-00-0751

CITIZENS COMMUNICATION COMPANY'S REPLY IN SUPPORT OF ITS NOTICE OF APPEARANCE OF SUBSTITUTE COUNSEL

Introduction

The introductory remarks to the Arizona Rules of Professional Conduct ("Rules") warn that "the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons." Attempts to disqualify opposing counsel thus "should be viewed with caution, . . . for [they] can be misused as a technique of harassment." Comment to Rule 1.7. The objections (collectively the "Objections") filed by Mohave and Santa Cruz Counties and Staff (collectively the "Objectors") to Citizens' Notice of Appearance of Substitute Counsel are so plainly groundless that

they cannot fairly be construed as anything but just the sort of "technique of harassment" condemned by the Rules, judges everywhere and commentators.

If the Objectors had bothered to read the *very first sentence* of Rule 3.7—the *only* legal basis either Objector cites for seeking to deprive Citizens of its counsel of choice—they could not possibly have objected in good faith to Citizens' choice of Joseph Mais as one of its substitute counsel. Rule 3.7 limits the circumstances in which an individual lawyer may be precluded from appearing as trial counsel to those in which the lawyer is "***likely to be a necessary witness***."[1] The Objections are therefore dead on arrival, because Mr. Mais:

- has never been identified as a witness in this proceeding by any party, and the deadline for disclosing witnesses has long since elapsed. [*See* Jan. 14, 2002 Procedural Order] Indeed, in the many weeks after Mr. Mais' involvement was first disclosed, neither Staff nor the Counties has ever even suggested that they might wish to call him as a witness—until *after* Citizens identified him as one of its substitute counsel;

- cannot possibly be a *necessary* witness, because he provided only general advice on the narrow question of Arizona court dockets and procedure, and, in any event, evidence about that advice is available from other witnesses and documents.

Moreover, even if Mr. Mais *were* a necessary witness, Rule 3.7(a) permits him to represent Citizens in these proceedings where "the testimony relates to an uncontested issue" or "disqualification of the lawyer would work a substantial hardship on the client." As shown below, both of these exceptions would apply here.

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[1] The full text of Rule 3.7 is:

"ER 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or ER 1.9."

From the manifestly false premise that Mr. Mais cannot serve as Citizens' hearing counsel, the Objectors then assert that the entire Brown & Bain law firm must be disqualified. This assertion is also flatly contradicted by the plain language of Rule 3.7. Subsection (b) "makes clear that the disability imposed by subsection (a) is personal, and should *not* be imputed to other lawyers in the firm" [Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 33.8, at 33-8 (3d ed. 2001)], "unless a conflict of interest exists under ER 1.7 [conflicts involving current clients] or 1.9 [former clients], or disqualification is appropriate for some other reason." *Sec. Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 336 & n.2, 718 P.2d 985, 989 & n.2 (1986) ("ER 3.7(b) specifically contemplates that a law firm will continue to represent the client even when an attorney is called as a witness"). The Counties' description of Rule 3.7(b) as a "narrow" and "limited" (but inapplicable) "exception" to firmwide disqualification is therefore demonstrably inaccurate. The "exception" of lack of imputation is the *rule*, and there is no principled basis for contending that any Brown & Bain lawyer other than Mr. Mais could possibly be excluded as Citizens' hearing counsel.

This Reply shows that the Objections repeatedly misstate the factual record and procedural history of these proceedings, repeatedly ignore or mischaracterize the governing legal principles, including both the text of Rule 3.7 and the cases interpreting the Rule, and seek relief—disqualification of Brown & Bain—that is so obviously meritless that no competent lawyer could seek such relief in good faith. But the Objectors do not seek this relief in good faith. Rather, the Objectors use the Objections as a platform to advance their theme that Citizens' choice of counsel continues a "pattern of imprudence," thereby attempting to "poison the well" on the merits of Citizens' application and to blame the victim of these frivolous Objections—Citizens—for their sideshow.

The Objections should be overruled, and counsel for Staff and the Counties admonished that this Commission will tolerate no further efforts to deny Citizens its right to a fair hearing.

Factual and Procedural Background

More than a year ago, Citizens asked Brown & Bain to provide limited advice to Citizens and its outside counsel regarding general procedural aspects of litigation in Arizona's state and federal courts, such as the civil docket backlog in those courts and the timetable for lawsuits filed here.

[Flynn Decl. ¶¶ 3-9 (attached as Ex. A)] Brown & Bain was not asked to opine regarding the merits of Citizens' dispute with APS, but instead asked only whether such a dispute (under assumed facts) likely could be adjudicated in Arizona courts on an expedited basis. *Id.* One of the Brown & Bain lawyers Citizens asked to represent it in these proceedings, Mr. Mais, was one of the two Brown & Bain lawyers who provided that advice. (The only other Brown & Bain lawyer who advised Citizens then has no role in the current proceedings.)

The substance of Brown & Bain's advice is memorialized in the rebuttal testimony of Citizens' outside counsel, Paul Flynn, and in two documents: (i) a memorandum dated April 26, 2001, and (ii) handwritten notes prepared by Mr. Flynn, all of which Citizens produced to the parties in these proceedings in February 2002. *Id.* Exs. 1 & 2. Brown & Bain's advice as to the likelihood of an expedited resolution in Arizona courts of Citizens' dispute with APS is both narrow and uncontroversial. As Mr. Flynn notes in his rebuttal testimony (at 9-10), Brown & Bain advised him that "civil litigation in Arizona federal district court would confront an extremely crowded docket and take several years at best . . . [and that a] preliminary injunction precluding APS's interpretation of the contract—and thereby granting Citizens' relief from high charges during the pendency of the lengthy litigation—would be very difficult to obtain in this lawsuit, as it would be essentially a contract suit for which money damages usually are recognized as sufficient."

Neither Objection even bothers to explain how testimony from a Brown & Bain witness would be necessary—or even helpful—to these proceedings. The closest they come is when the Counties assert that they "will be using Brown & Bain's opinions and statements to impeach Citizens' witnesses . . ., [requiring] the Brown & Bain lawyer representing Citizens . . . to choose between supporting his client's position or that of his partner." The Staff's Objection, which asserts that a "direct conflict" exists between Brown & Bain and Citizens, suggests that it, too, believes that Brown & Bain's advice may somehow be used to impeach Citizens' witnesses. Nonsense. There is no possible way that Brown & Bain's limited advice regarding Arizona court procedural matters could be used in these proceedings to "impeach" Citizens witnesses, because no Citizens witness has submitted testimony that is in any way inconsistent with Brown & Bain's advice (the substance of which is reflected in contemporaneous documents and the rebuttal testimony of Mr. Flynn). [Flynn

Decl. ¶¶ 3-9] Tellingly, the Objectors do not even *attempt* to identify the "conflict" between the Brown & Bain advice and any position taken by any Citizens witness in these proceedings.[2]

Given the remoteness of Brown & Bain's advice to any contested issue in these proceedings, it is not surprising that the Objectors consistently exhibited complete apathy regarding Brown & Bain's role and advice during prehearing proceedings—that is, until Brown & Bain was identified as Citizens' replacement counsel. The Staff's data requests ask in general terms about "legal advice," but ask nothing specifically about Brown & Bain or its role. None of the five data requests submitted by the Counties include *any* suggestion of concern about *any* legal advice Citizens received.

Even after the parties received all of Citizens' supplemental data request responses, Mr. Flynn's rebuttal testimony, and the two documents memorializing Brown & Bain's advice, the Objectors remained entirely disinterested in Mr. Mais and Brown & Bain's advice. The governing procedural order requires Staff, the Counties, and other intervenors to submit all testimony by March 19, 2002, but no party has listed Mr. Mais or any Brown & Bain representative as a witness, no witness identified by any Objector has proffered testimony relating to Brown & Bain's advice or any document written by or relating to Brown & Bain.

The transcript of the March 21 prehearing conference confirms that none of the parties suggested even the *possibility* of calling a witness from Brown & Bain. Nor did any party suggest at that prehearing conference that Brown & Bain did or said anything that would bear in any way on any issue in the proceedings, or that additional witnesses, exhibits or discovery were required.

The deadline for listing, and even supplementing, witnesses and exhibits passed more than two months ago. Thus, both Objectors are just plain wrong when they say that Mr. Mais is "a potential witness." And the Counties seriously misrepresent the record by asserting that:

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[2] There is also no prospect that Mr. Flynn or other Citizens witnesses could be "impeached" by testimony that contradicts their recollection of Brown & Bain's advice, because the subject matter and content of the advice is undisputed—and memorialized in contemporaneous documents. Thus, even if the details of the procedural aspects of Arizona state and federal court litigation were vitally relevant to these proceedings (which they are not), the Brown & Bain advice holds no potential "impeachment" value.

(i) "Mr. Mais is *already a witness* in this proceeding and his role is likely to expand" and (ii) "[t]he *fact* is that Brown & Bain attorneys *are witnesses* in this case" (emphasis added).

The Counties again misstate the record when they claim that their April 5 Motion for Findings of Fact or Stay "specifically identified Brown & Bain as one of the firms that, having provided legal counsel to Citizens, would be the subject of examination." That motion says *nothing* about the need to examine Brown & Bain witnesses at the evidentiary hearing, and neither does Staff's (or RUCO's) response to the motion. Rather, the motion merely declares the Counties' intention to examine Mr. Flynn "and other Citizens witnesses." But the reference to "other Citizens witnesses" cannot possibly include Brown & Bain, for no Brown & Bain representative has *ever* been a "Citizens witness," and no party has ever before expressed any interest in changing that. *See also* Ex. 3 to Motion (Mar. 12, 2002 letter from Heyman to Grant) ("it is likely I will question *Mr. Flynn* regarding the written legal opinion and draft documents that were prepared by his firm").

Against this factual background, the Counties' assertion that they have suddenly "determined that Brown & Bain's opinions are an integral part of their examination" can be seen for what it is.

Legal Analysis

I. THE COMMISSION SHOULD VIEW ATTEMPTS TO INVOKE RULE 3.7 WITH GREAT SKEPTICISM IN ANY CIRCUMSTANCES, AND THE OBJECTORS MUST OVERCOME A SIGNIFICANT BURDEN TO PREVAIL IN THEIR EFFORTS TO DISQUALIFY CITIZENS' COUNSEL OF CHOICE.

The Counties pay lip service to the fundamental principles of Arizona disqualification law, while the Staff ignores them altogether, perhaps because those principles cannot be harmonized with the Objections. Arizona law places a heavy burden on a party who attempts to call an adversary's counsel as a witness, and thereafter seeks counsel's disqualification under Rule 3.7. "Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent" [*Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984) (reversing disqualification)], "because every litigant has the ***right*** to the counsel of its choice." *Sec. Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 335, 718 P.2d 985, 988 (1986)

(reversing disqualification of lawyer-witness); *see* Comment to Rule 3.7 ("due regard must be given to the effect of disqualification on the lawyer's client").[3]

Disqualification motions generally are prone to abuse. That potential is particularly poignant where, as here, proposed disqualification is premised on a litigant's contention that his opponent's lawyer must be a fact witness, even though the lawyer's *client* has not called or listed the lawyer as a witness. The principal danger of the lawyer-witness situation is *to the client* (especially if the lawyer's testimony impeaches the client), so courts turn a jaundiced eye to opponents who attempt to override the *client's* conclusion that the benefits of retaining that lawyer outweigh any downside. Courts in Arizona and elsewhere have long recognized the "obvious dangers" posed by a motion in these circumstances. *Sec. Gen.*, 149 Ariz. at 335, 718 P.2d at 988. "By misusing the advocate-witness prohibition, an attorney might elbow opposing counsel out of the litigation for tactical reasons." *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981). This "is a practice which will not be tolerated." *Id.*; *accord Sellers v. Superior Court*, 154 Ariz. 281, 290, 742 P.2d 292, 301 (Ct. App. 1987) (reversing disqualification of lawyer-witness).[4]

In light of this potential for abuse, courts "view with suspicion motions by opposing counsel to disqualify [an opposing] party's attorney." *Gomez v. Superior Court*, 149 Ariz. 223, 226, 717

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[3] Concern over the kind of abuse evidenced by the Objections is a major reason Rule 3.7 "requires an even more specific showing" than did its predecessor, DR 5-102 of the Model Code of Professional Conduct ("Code"). [*Sec. Gen.*, 149 Ariz. at 335 n.1, 718 P.2d at 988 n.1] For this reason alone, the Counties' heavy reliance on *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*—the only case they cite in which disqualification was approved—is unjustified, because that case was decided under the Code, not the Rules.

The former Code provision, DR 5-102, was widely criticized because it required no specific consideration of the client's rights, and had a much lower standard for disqualification than the "necessity" requirement of Rule 3.7. *See Cannon Airways, Inc. v. Franklin Holdings Corp.*, 669 F. Supp. 96, 100 (D. Del. 1987) ("An important criticism of the Code formulation [was] that it was susceptible to use as a tactical measure to disrupt an opposing party's preparation for trial."); *see also Chappell v. Cosgrove*, 916 P.2d 836, 839 (N.M. 1996) ("[t]he American Bar Association responded to these abuses by adopting [Rule] 3.7"); Am. Bar Ass'n, *Annotated Model Rules of Prof'l Conduct* 364 (4th ed. 1999) ("Rule 3.7 gives greater weight to the client's own judgment regarding choice of counsel").

[4] As the Counties emphasize, another justification for a lawyer-witness limitation is that jurors can be confused by a person who is a sworn witness one minute, and an advocate the next. *See* Comment to Rule 3.7 ("It may not be clear whether a statement by an advocate-witness should be taken as proof or analysis of the proof."). But that danger is lessened in the absence of a lay jury, and we trust that the Commission would be capable of comprehending the distinction if it arose.

P.2d 902, 905 (1986). After all, "opposing counsel has little desire to seek dismissal of a bumbling opponent," so "[t]hose of the profession who represent their clients zealously and competently . . . are often the most likely targets of a motion to disqualify." *In re Abbott Dairies, Inc.*, 61 B.R. 156, 158 (Bankr. E.D. Pa. 1986). The moving party must therefore shoulder a heavy burden of proving that disqualification is required, and "whenever possible the courts should endeavor to reach a solution that is least burdensome upon the client or clients." *Sellers*, 154 Ariz. at 285, 742 P.2d at 296 (citation omitted).

When the Commission disqualified Citizens' initial counsel in these proceedings, it expressed concern with public perception if it allowed a firm to represent Citizens that had contemporaneous ties to Pinnacle West. Brown & Bain's loyalty to Citizens, however, cannot be questioned.

Consequently, these Objections create exactly the *opposite* appearance than that which troubled the Commission previously, for when a party seeks to interfere with its opponent's choice of counsel for tactical reasons, "public confidence in the integrity of the legal system is proportionately diminished." *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1316 (5th Cir. 1995) (citation omitted). "Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary." *Id.*; *see also Carlyle Towers Condo. Ass'n v. Crossland Sav., FSB*, 944 F. Supp. 341, 345 (D.N.J. 1996) ("When pondering the proper outcome from a specific case, courts must exercise extreme caution not to act under the misguided belief that disqualification raises the standard of legal ethics and the public's respect; the opposite effect is just as likely—encouragement of vexatious tactics, which increase public cynicism about the administration of justice") (citation omitted); *Optyl Eyewear Fashion Int'l v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (affirming sanctions for frivolous attorney-witness disqualification motion; "[t]he cost and inconvenience to clients and the judicial system from misuse of the rules for tactical purposes is significant").

These concerns are particularly acute here, because both Objectors are government entities. "For the State to participate in the selection or rejection of its opposing counsel is unseemly if for no

other reason than the distasteful impression which could be conveyed." *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317 (citation omitted); *see also State v. Serna*, 163 Ariz. 260, 268, 787 P.2d 1056, 1064 (1990) ("we deplore any governmental action that intrudes on the attorney-client relationship").

In light of the respect to which Citizens' choice of counsel is entitled, the obstacle the Objectors must overcome is great. Even a cursory review of Rule 3.7 and the legal authorities discussing it shows just how baseless the Objections are.

II. THE BASIC REQUIREMENTS OF RULE 3.7 ARE ABSENT.

The Rule upon which the Objections are premised requires proof that Mr. Mais is "***likely to be a necessary witness***" before disqualification could be appropriate (if its exceptions were not otherwise met). The Objections do not even mention this requirement, must less attempt to show that it is met here. Worse yet, both Objectors *over*state the record, and the Counties flatly *mis*state it.

A. Mr. Mais is Not a Witness *At All.*

As discussed above, neither Mr. Mais nor any other Brown & Bain lawyer is now, or has ever been, a witness in these proceedings. To the contrary, the record reflects that the Objectors' feigned interest in Brown & Bain arose only after the firm's appearance and is nothing more than "a tactical contrivance to trigger disqualification." *Sellers*, 154 Ariz. at 288, 742 P.2d at 299 (reversing disqualification).

The Counties' assertions that "Mr. Mais is *already a witness* in this case" or "[t]he *fact* is that Brown & Bain attorneys *are witnesses* in this case" are simply false. So, too, is their statement that they "specifically identified Brown & Bain as one of the firms that . . . would be the subject of examination." Notwithstanding these misrepresentations, the *fact* that no Brown & Bain lawyer is a witness requires the Objections be rejected.

B. Mr. Mais is Not a "Necessary" Witness.

Even assuming, for the sake of argument, the Objectors had definitively declared an intent to call Mr. Mais as a witness (they have not), and even if they had timely done so (they did not) or could now (they cannot), he *still* would not be a "necessary" witness, which is "the sine qua non for disqualification under ER 3.7." *Sec. Gen.*, 149 Ariz. at 335, 718 P.2d at 988. "A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for

disqualification even if that counsel could give relevant testimony." *Id.* Rather, the moving party must meet a "dual test for 'necessity.'" *Id.* The proposed testimony must be material, and it must be unobtainable elsewhere. *Id.* Neither prerequisite to "necessity" is present here.

1. The Details of the Issues Upon Which Mr. Mais has Percipient Knowledge are Tangential.

As reflected in Mr. Flynn's rebuttal testimony, his notes of his discussion with Mr. Mais, and the Brown & Bain memorandum that Mr. Mais co-authored, Mr. Mais' involvement was limited to an analysis of the practical likelihood of Citizens getting prompt attention from an Arizona state or federal court, *if* it were to file a civil lawsuit against APS. [*See* Flynn Decl. ¶¶ 3-9] That issue is distinct from *whether* Citizens should sue APS, upon which Mr. Mais was not asked to, nor did he, opine. The details of Mr. Mais' advice are therefore remote from any issue in these proceedings. Neither Objector even asserts that he is a necessary witness; the most they say is that the Counties "reserve their right" to seek his testimony. The insignificance to the proceedings of actual testimony from a Brown & Bain witness is fatal to the Objections. *See, e.g.*, *Humphrey ex rel. Minn. v. McLaren*, 402 N.W.2d 535, 541 (Minn. 1987) ("If the lawyer's testimony is . . . quite peripheral, . . . ordinarily the lawyer is not a necessary witness and need not recuse as trial counsel."); *S&S Hotel Ventures L.P. v. 777 S.H. Corp.*, 508 N.E.2d 647, 651 (N.Y. 1987) ("Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters . . . ."); *LeaseAmerica Corp. v. Stewart*, 876 P.2d 184, 191 (Kan. Ct. App. 1994) (reversing Rule 3.7 disqualification; necessity "will generally require that the opposing party demonstrate that the advocate's testimony will be substantially useful to that party").

2. There are Numerous Sources of the Identical Evidence.

The Counties' Objection acknowledges that it is unfounded unless they prove that the evidence is "unobtainable elsewhere." This is because "[a] necessary witness is not the same thing as the 'best' witness. If the evidence that would be offered by having an opposing attorney testify can be elicited through other means, then the attorney is not a necessary witness." *Harter v. Univ. of Indianapolis*, 5 F. Supp. 2d 657, 665 (S.D. Ind. 1998).

The advice given by Mr. Mais, however, is fully reflected in the contemporaneous documents and the testimony of Mr. Flynn, and the Objectors could obtain testimony on the matters reflected in those documents, if they are truly serious about doing so, from other Citizens witnesses—*as they allege elsewhere in the Objection they intend to do*. *See* Counties' Objection at 2 ("the Counties will examine Citizens' witnesses (including Messrs. Breen, Dabelstein and Flynn) regarding Mr. Mais' letters [sic] and communications").[5] Moreover, because the Brown & Bain advice is reflected in contemporaneous notes and memoranda, Mr. Mais cannot be a "necessary" witness. *See Harter*, 5 F. Supp. 2d at 666 (refusing to disqualify lawyer; "There is a long paper trail in this case. [The lawyer] said what she said and wrote what she wrote. Her testimony is not necessary to prove those communications occurred."); *Horaist v. Doctor's Hosp.*, 255 F.3d 261, 267 (5th Cir. 2001) (same; "[e]ach item of information that [the lawyer] could provide is already available from another source"); *Isaacson v. Keck, Mahin & Cate*, 61 Fair Emp. Prac. Cas. (BNA) 1140, 1142-43 (N.D. Ill. 1992) (same; available testimony from other participants in same investigation and internal memoranda defeated "necessity"); *UFCW Health & Welfare Fund v. Darwin Lynch Adm'r*, 781 F. Supp. 1067, 1071 (M.D. Pa. 1991) (same; available testimony from other witnesses defeated "necessity"); *Humphrey*, 402 N.W.2d at 541 (same; no necessity "[i]f the lawyer's testimony is . . . already contained in a document admissible as an exhibit").

The Counties contend, without elaboration, that "Brown & Bain attorneys are the only ones who can provide underlying information regarding the assumptions they made [and] the analysis they undertook." The premise ("Brown & Bain attorneys are the only ones") is factually wrong for the reasons discussed above—the Objectors can get that information from documents or others' testimony. The incremental value, if any, of probing the "underlying information" and "assumptions" for Brown & Bain's general guidance about the pace of complex Arizona civil litigation (beyond the documents and testimony already available) is simply too remote to warrant the extraordinary penalty of denying Citizens its chosen counsel.

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[5] Although testimony from a Brown & Bain witness would not, for all the reasons discussed, be appropriate, if the Commission insists on such testimony, the other Brown & Bain lawyer who participated in the advice, Brian Lake (whom the Counties also purport to "reserve their rights to call"), could testify without the need to disqualify anyone. *See* Rule 3.7(b).

III. RULE 3.7'S EXCEPTIONS APPLY.

Because Mr. Mais is not a witness, much less a "necessary" witness, Rule 3.7's fundamental predicates are absent, which disposes of the Objections. Even if the Objectors *could* make those threshold showings, however, Rule 3.7(a) permits the representation where "the testimony relates to an uncontested issue" or "disqualification of the lawyer would work substantial hardship on the client." Both of these exceptions are applicable here.

Neither Objection addresses the "uncontested issue" exception; indeed, both imply that there must be some contested issue upon which Mr. Mais' testimony is necessary, but, as discussed above, neither bothers to identify it. That is because there is no such issue; certainly the procedural aspects of Arizona state and federal court litigation on which he advised Citizens are not contested in these proceedings—the Objectors have not designated any testimony on the subject that controverts the advice. As discussed above, Mr. Mais indisputably did not advise Citizens on the merits of its potential claims against APS, so there is no "contested issue" upon which he could possibly testify. [*See* Flynn Decl. ¶¶ 5-9]

The Counties denigrate the "hardship" to Citizens of disqualifying its counsel by saying "[t]here are no deadlines currently in place in this proceeding and no hearing date has been set." Beyond the basic fact that Citizens would be yet again deprived of its trusted, longstanding counsel in a critical matter,[6] and would have to find yet another firm that the Objectors would "approve" (no mean feat in a jurisdiction in which representation of Pinnacle West and related companies apparently would rule out most local firms large enough to take on this significant task), Citizens must finance an estimated $750,000 per month in carrying charges as the matter lingers. *See* Aff. of

[6] Although Mr. Mais does not regularly practice before this Commission, Citizens has turned to him on several occasions over the past decade to represent it in complex litigation. Illustratively, in *Sun City Taxpayers Ass'n v. Citizens Utils. Co.*, 847 F. Supp. 281 (D. Conn. 1994), *aff'd*, 45 F.3d 58 (2d Cir.), *cert. denied*, 514 U.S. 1064 (1995), Mr. Mais and Mr. Marks secured dismissal, affirmed on appeal, in a federal RICO action. More recently, in *Citizens Communications Co. v. Peterson*, No. 2 CA-SA-01-0097 (Ariz. Ct. App.), Mr. Mais was counsel of record for Citizens in a special action challenging various trial court rulings in connection with a consumer class action. (That action was settled three months later.) Given the stakes in these proceedings, the longstanding relationship between Citizens and Brown & Bain (and, in particular, Mr. Mais) and Citizens' urgent need to secure counsel able to master the record promptly, its decision to retain Brown & Bain (and Mr. Mais) as its hearing counsel was obvious and appropriate.

L. Russell Mitten, submitted Mar. 28, 2002. Every new set of lawyers for Citizens delays the resolution of this matter while the lawyers familiarize themselves with the record and background, and requires Citizens to shoulder the associated costs of duplicative legal fees, in addition to the massive carrying charges.

Brown & Bain has been preparing, and must continue to prepare, for the evidentiary hearing in this matter if it is to be heard as soon as September, as Citizens has requested. Moreover, the Counties have filed a motion that seeks, in essence, summary judgment against Citizens, and significant preparation continues, and is required, for the hearing on that motion.

The first disqualification delayed the resolution of this matter by five months. Another disqualification would delay the proceedings further, and deprive Citizens not only of its chosen counsel, but also of the benefits of the significant work accomplished in the last few weeks. Although that may be a goal of the Objections, disqualification of Brown & Bain would be contrary to law and a gross abuse of the Rules.

Conclusion

The Commission should respect Citizens' choice of Mr. Mais as its counsel. The Objections should be overruled.

Dated: May 22, 2002.

Respectfully submitted,

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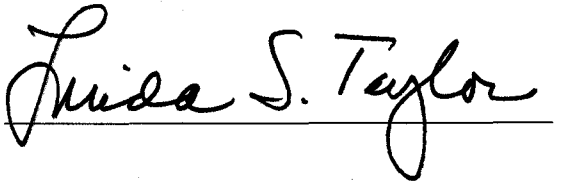

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DECLARATION OF PAUL M. FLYNN

I, PAUL M. FLYNN, declare as follows:

1. I am a member of the law firm of Wright & Talisman, P.C., and have submitted prepared written testimony on behalf of Citizens Communications Company ("Citizens") in Arizona Corporation Commission Docket No. E-1032C-00751. This affidavit is based on matters within my personal knowledge.

2. Citizens retained Wright & Talisman in 2000 to assist Citizens in connection with its dispute with Arizona Public Service Company ("APS") regarding their 1995 Power Supply Agreement.

3. In the course of representing Citizens, Wright & Talisman considered the possibility of filing a lawsuit against APS or related entities in Arizona state or federal court. Wright & Talisman suggested to Citizens that it would be useful to retain as local counsel a local lawyer familiar with the Arizona federal and state court system to advise us on procedural aspects of complex civil litigation in those fora, including such matters as the backlog of the civil docket in those courts, the degree of difficulty, in general, of obtaining preliminary injunctive relief in commercial litigation in such courts, and other tactical and procedural issues that would affect such a lawsuit and whether it could be resolved expeditiously.

4. Citizens retained Joseph E. Mais, and the Phoenix firm of Brown & Bain, P.A., to advise us on the topics discussed in paragraph 3. I understand that Mr. Mais and Brown & Bain had previously represented Citizens in litigation matters.

5. Mr. Mais and a Brown & Bain associate, Brian Lake, provided advice (in both written and oral form) regarding the topics discussed in paragraph 3. Wright & Talisman did not ask Brown & Bain to opine regarding the merits of Citizens' dispute with APS, or whether Citizens should bring a lawsuit or regulatory action against APS.

6. The substance of this advice is discussed at pages 9-10 of the rebuttal testimony I submitted in this matter, where I said:

> "[O]ur communications with Citizens' local Arizona counsel highlighted that civil litigation in the Arizona federal court would confront an extremely crowded docket and take several years at best. Local counsel also reinforced our conclusion that a preliminary injunction precluding APS's interpretation of the contract—and thereby granting Citizen[s] relief from high charges during the pendency of the lengthy litigation—would be very difficult to obtain in this lawsuit, as it would be essentially a contract suit for which money damages are usually recognized as sufficient."

7. Attached as Exhibit 1 are my handwritten notes of a telephone conversation with Mr. Mais. Those notes reflect discussions of the type mentioned in paragraph 3 and in my direct testimony.

8. Attached as Exhibit 2 is an April 26, 2001 letter and accompanying memorandum. The memorandum (authored by Messrs. Mais and Lake) discusses topics of the type mentioned in paragraph 3 and in my rebuttal testimony.

9. The Brown & Bain lawyers did not advise me, and to the best of my knowledge, did not advise Citizens, about the merits of Citizens' dispute with APS.

10. If called to testify, I am capable of testifying about the advice, as described above, that Brown & Bain lawyers provided to Wright & Talisman and, through us, to Citizens, in Spring 2001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of May, 2002.

Paul F Flynn

Paul M. Flynn

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Joe Mais

Arizona Edison v.
So. Sierra Power Co

17 F.2d 739 9th Cir
1927

annotation under Arizona statute

9th Cir reversed grant of P.I. in
wholesale power contract dispute

Busiest district in country
in terms of civil matters
per judge
grossly underfunded - too few judges

one of the slowest districts
in country to bring civil
case to trial

Prescott has a lot of retirees
and former military.

trial civil case you would be
considered expedited

complex civil trials take years

routine criminal trials
push them out

state judiciary is merit-based,
federal appt

Babbitt got in pretty good judges

6-8 judges on special assignment - tend to get the complex civil

State is 6 out of 8 jurors for a verdict

federal court is unanimous of 12 jurors

would be faster in state court, still be a stretch to read it in w/in a year

w/in 270 days, file a certificate of readiness

complex case is 2-3 yrs request special conferences

each side gets one free strike of a judge!!

p.i. success in state ct is win less likely than fed

Brian Lake is number of firms of court 4/25

will likely be going out in AZ

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BROWN & BAIN, P.A.
Attorneys at Law

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April 26, 2001

Citizens Communications Co. v. APS

Dear Mr. Flynn:

Per your request, attached is a short memorandum discussing possible procedures for seeking expedited discovery and an early trial date for a potential action against APS in Arizona District Court. Please feel free to contact me at the number listed above if you have any questions.

Sincerely,

Joseph E. Mais

Paul M. Flynn, Esq.
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802

FACSIMILE AND MAIL

JEM/bcl

Enclosures

MEMORANDUM FOR MR. FLYNN

Joseph E. Mais
Brian C. Lake

April 26, 2001

Citizens Communications Co. v. APS

Procedure for Seeking Expedited Trial

As you requested, we have considered ways in which we might be able to get a court to accelerate and set an early trial date for the proposed suit against APS in federal court in Arizona. Rather than filing a motion for preliminary injunction (which, in this case, we believe would be unsuccessful, and may prejudice and even delay the ultimate resolution of the case), we suggest that you consider filing along with the complaint a motion seeking (i) leave to file discovery under Rule 26(d) and (ii) an expedited Rule 16(b) scheduling conference at which Citizens would ask the court to adopt an accelerated discovery schedule and set an early trial date.

The Federal Rules of Civil Procedure provide that in the usual case, the court shall hold a scheduling conference and enter a scheduling order "within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant." Fed. R. Civ. P. 16(b). Rule 26(f) requires that the parties confer "at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)" to "develop a proposed discovery plan." And Rule 26(d) states that neither party may seek discovery until after the parties have conferred as required by Rule 26(f).

Rule 26(d) does permit discovery to proceed prior to the Rule 26(f) conference upon "order or agreement of the parties." Thus, Citizens could file, at the same time it files its complaint in federal court, a motion seeking leave to file discovery under Rule 26(d) and an expedited Rule 16(b) scheduling conference, together with a motion for expedited consideration.

Rule 16 of the Federal Rules of Civil Procedure gives the District Court broad case management authority under which it may issue a case scheduling order setting dates for

discovery, pretrial motions, conferences and trial. Rule 16 gives the judge "a wide range of tools" for managing cases, and "directs the judge to selectively apply those tools to tailor a case development plan that is directly responsive to the specific needs and circumstances of each individual case." MOORE'S FEDERAL PRACTICE 3d ed. § 16.03[2] (2000). Rule 16 also "empowers district courts to determine which categories of cases should be relieved from compliance with the general procedural or management prescriptions that apply to mainstream civil actions." Id. Citizens could argue that Rule 16's broad grant gives the court the authority to accelerate discovery and move up the trial date in this case.[1]

Of course, we would need to convince the court that it *should* expedite the proceedings in this case. Convincing the court to give our case priority in setting a trial date may not be an easy task. As we discussed previously, the federal courts in Arizona have a large backlog of cases, and Citizens' action is not based on a federal statute that specifically provides for scheduling priority. Each Arizona federal judge typically has his or her own set of guidelines regarding scheduling conferences that need to be taken into account as well.[2] However, 28 U.S.C. § 1657 does provide that the court "shall expedite the consideration" of "any other action if good cause therefor is shown." Citizens may argue that the dispute's substantial impact on a broad segment of the rate-paying public, the continuing nature and the monetary impact of APS's improper overbilling, and the current instability of the electric power markets all suggest that there is "good cause" to expedite this action. Furthermore, Citizens' complaint includes a request for declaratory judgment, which, under the Federal Rules, provides an additional reason for

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[1] See MOORE'S FEDERAL PRACTICE 3d ed. § 16.13[2][c][i] (2000) ("Given the virtually limitless reach of this clause, courts are empowered to address in scheduling orders the entire range of issues that can come into play in the pretrial development of a civil case.")

[2] See attached Brown & Bain internal summary prepared as of December 1999. Also attached for your reference is an example of a scheduling order recently entered by the court, as well as a list of recent changes to the Arizona District Court's local rules relating to the filing of pleadings and motions.

expediting the action. See Fed. R. Civ. P. 57 ("The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.").

We would note that Citizens could bring this action in Arizona Superior Court which, unlike federal court, provides that discovery requests can be served by the parties at any time. See Ariz. R. Civ. P. 26(d). In an action in state court, Citizens could therefore serve discovery requests on APS along with the complaint.[3] Arizona's Rule 16(b) specifically provides that "upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference," at which the court may, among other things, "[d]etermine the desirability of special procedures for management of the case," "[d]etermine whether any time limits or procedures set forth in the discovery rules or set forth in these Rules or Local Rules of Practice should be modified or suspended," "[d]etermine a trial date," and "[m]ake such other orders as the court deems appropriate." The Arizona Rules contain no formal requirement that the parties meet and confer on discovery and scheduling issues prior to the pretrial scheduling conference.

Rule 2.2(a) of the Local Rules for Maricopa County Superior Courts lists several types of cases which will be preferred for trial, including "any case granted a preference by statute or other rule of court," and "Hardship Civil cases." "Preference by reason of hardship may be granted only upon motion to the court." Maricopa County Local Rules, 2.2(c). Local Rule 2.2 further provides that "[a]ll cases entitled to a preference for trial by reason of statute, rule or order of court shall be set for trial at the earliest practicable date. All [such] civil cases . . . shall carry in its caption the following, or similar, notation: 'Priority Case' (citing rule number, order or section of statute)." Id. 2.2(d).

Citizens may argue that this action should be deemed a "Priority Case" under the court rule permitting expedited consideration of an action seeking declaratory judgment, see Ariz. R.

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[3] A party must respond to a discovery request within 40 days of service of the request, ***or*** within 60 days of service of the complaint, whichever is longer. See Ariz. R. Civ. P. 34(b).

Civ. P. 57 ("The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."). In the alternative, Citizens may argue that the court should, pursuant to its Rule 16 authority, enter a scheduling order setting an early trial date and specifically classifying the action as a "Priority Case" under Local Rule 2.2.

Joseph E. Mais

/sjl

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